No. 2688

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH K. BLAIR and THOMAS ADDIS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY TO PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The Government (the defendant in error), finds itself in an embarrassing position caused by the action of counsel for plaintiffs in error, following the conviction in the court below, and is also embarrassed by the unexpected action of the court in not passing upon the sufficiency of the evidence

to justify a trial jury in finding that section 10 of the Federal Criminal Code, had been violated.

The plaintiffs in error themselves have now asked the court for a rehearing of the case. But in doing so, they have conceded only half the amount that common fairness would demand in view of the solemn stipulation entered into at their own solicitation.

In other words, counsel have conceded that they did not intend to raise the question of the abridgement of their right to a trial by jury within the common law definition, but they fail and refuse to concede the plain fact that the so-called "Agreed Statement of Facts" was to be not a "technical agreed case," but merely evidence or probative facts from which ultimate facts and conclusions were to be drawn by the court sitting as a jury.

Counsel would set at naught the purpose of the stipulation, to wit, to have the District Court consider this stipulation as *evidence,* and then construe the words "hire or retain" found in said section 10 of the Penal Code, and thus advise the Government of the United States and Great Britain as to whether the activities complained of were legal or illegal. The District Judge was requested, in fact urged, by all parties to perform for the purposes of this test case, the functions of himself, giving his unbiased opinion of the effect of the evidence as well as construing the statute above referred to. The idea was that the District Judge, eminently

fair at all times, and trained in passing on questions of fact, would render an opinion that would carry more weight than the verdict of the ordinary jury at this period of national excitement and unrest. While the right of review was not waived, it was the intention of all parties that the findings of fact of the District Court should be conclusive.

Counsel now insist that this court shall thwart this purpose by adhering to its opinion that this stipulation shall be classed and treated as the statutory "agreed case," and thus prevent the court from carrying out the very object of the agreement. This, too, to the great discredit of the Court below, who understood that he was to be permitted to exercise every right a jury could have in the consideration of evidence. His own words were:

"Perhaps that is no more than asking the court to pass on the sufficiency of the facts to warrant a conviction is it." (Tr. p. 98, Fol. 87.)

The stipulation was treated as evidence and long arguments as to the inferences and deductions therefrom were made to the Court by counsel on both sides.

The case was one of conspiracy to be proved, as usually is the case, from circumstances alone. Every circumstance surrounding the case shows that it was the intention of parties to present a circumstantial set of evidentiary facts for the consideration of the Court and jury.

If it was an "agreed case" technically so-called, why did we have a jury at all? Why did we not agree to ultimate facts and be done with it?

We of course could not agree as to why the Government of Great Britain was spending large sums of public funds to get men together.

Neither could we agree as to the exact purpose of putting them through two physical examinations before providing them with transportation to Liverpool.

Nor could we agree why the British Friendly Association was organized to get together men "sound in body and limb."

Nor could we agree on the purpose of the British Consul in maintaining an office for Blair as a British officer and Addis as an examining physician.

Nor could we agree as to the purpose of requiring a card and signature stating the amount of military service applicant had undergone.

Nor could we agree on the purpose of maintaining a public eating house or barracks, nor upon the purpose of keeping a so-called muster roll (Exhibit C) and turning it over to the British Friendly Association for their use in getting men together.

Almost every clause of the stipulation contains probative as distinguished from ultimate facts. The

whole case is whether, by clandestine methods, our law was to be subverted by plaintiffs in error.

For nearly three years now, the neutrality of the United States has been shaken upon all sides. The Government is seeking to maintain its laws impartially and needs the advice of this court as to the proper construction of this statute.

AUTHORITIES.

Defendant in error feels that this court has erred in that portion of the opinion which clothes the stipulation in this case with technical attributes of an "agreed case."

The case of *Frank* vs. *U. S.* 192 Fed 861 is analogous to the present one. There, defendant was charged in a criminal information with a violation of the pure food act, waived a jury, and the case was heard by the Court on an agreed statement of facts, certain exhibits consisting of cans of pepper being also offered in evidence. From the exhibits, the Court, in support of certain allegations of the information, proof of which did not appear in the statement, drew the inferences that the words "composed of ground white pepper," etc., appearing "in small and inconspicuous type so placed upon said label as not to be readily noticed by the purchaser," and also the inference "that the label and branding as above set forth was calculated to deceive and mislead the purchaser thereof," and the Circuit Court of Appeals of the Sixth Circuit held

that this case was not heard on an agreed statement of facts only, and that the court could draw conclusions of fact from the statement and exhibits submitted.

In *Hackfield & Co.,* vs. *U. S.,* 197 U. S. 442; 49 L. Ed. 926, defendants were tried on a criminal information charging a violation of the Immigration Act. A jury was waived, and the case submitted to the Court on agreed statement of facts. The trial court found the defendants guilty and the Circuit Court of Appeals of the Seventh Circuit sustained the judgment on the ground that, though the stipulation recited that the escape of the immigrant did not occur by reason of negligence on the part of the defendants, the trial court might have found from the evidentiary facts stipulated that there was negligence. The case went to the Supreme Court on a writ of certiorari and, while it was there held that *since* the stipulation of evidentiary facts also included the ultimate fact that the escape did not occur by reason of the negligence of defendants, the trial court was bound by that conclusion and could not find that there was negligence. The court said that ordinarily the issue of negligence is one of fact to be determined by a jury where the state of facts is such that reasonable minds may fairly differ upon the question of whether there is negligence or not; and the inference is clear from the language of the court that had the agreed statement of facts not included the ultimate fact, that there was no negligence, the trial court would have been

warranted in drawing the conclusion of negligence from the specific facts recited.

In *Towle* vs. *Sweeney,* 2 Cal. App. 29, a civil case tried by the Court without a jury, it was held that the court may find ultimate facts from the probative facts set out in an agreed statement, and said, (p. 31):

> "An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an 'agreed case' which, under section 1138 of the Code of Civil Procedure, may be submitted for decision without any pleadings.

Also in *Burnham* vs. *North Chicago St. Ry. Co.,* 78 Fed. 101, the agreed statement of facts was held to be not an agreed statement of ultimate facts, but of evidentiary facts, and could not, therefore, be taken as the equivalent of a special finding of facts. The court said: (p. 103)

> "The agreed statement probably contains sufficient evidence to enable a trial court to determine the disputed questions between the parties either by a general or a special finding, but the finding that the facts are as set forth in the agreed statement is neither the one nor the other. The statement being one of evidence, the finding does not make it a statement of facts."

Also see *U. S. Trust Co.* vs. *New Mexico,* 183 U. S. 535; 46 L. Ed. 315, where a statement of facts agreed upon, consisting of a narrative of facts, transcripts of records, and the testimony which certain wit-

nesses would have given if they had been produced and sworn, was filed in the district court. The statement was held to be a statement of evidentiary facts, and not a statement of ultimate facts.

Also in *Wilson* vs. *Merchants' Loan & Trust Co.,* 183 U. S. 121; 46 L. Ed. 113, the agreed statement of facts upon which the case was submitted to the court included certain correspondence set out therein, and it was held that the agreed statement was not a statement of ultimate facts alone, but also of evidentiary facts upon which material ultimate facts might have been, but were not found by the trial court.

In *Parker* vs. *Urie's Heirs,* 21 Pa. 305, it was held that in an agreed case whenever the evidence is given instead of the facts themselves, the court will treat the case as in the nature of a demurrer to evidence, in which they may draw every inference against the party demurring, that a jury might reasonably draw.

Baltimore vs. *Consolidated Gas Co.* 99 Md 540 (58 A. 216) holds that under the practice in that State, "the court is at liberty, upon cases submitted upon agreed statement of facts, to draw all inferences of fact or law that court or jury could have drawn from the facts so agreed or stated, as if they had been offered in evidence upon a trial before the court and jury."

And in *Clark* vs. *Wise,* 39 How. Prac. 97, the Supreme Court of New York held in deciding cases submitted under section 372 of the Code, upon which

section 1138 of the California Code of Civil Procedure is based, the court is to draw from the facts stated, such conclusions as a jury would be warranted in drawing if the case was on trial before them.

AUTHORITIES CITED IN OPINION OF THE COURT.

The above cases are readily distinguishable from those cited by counsel for plaintiffs in error in their brief on appeal, some of which are cited by this Honorable Court in its opinion rendered February 19th, 1917.

In *Pomeroy's Lessees* vs. *Bank of Indiana,* 68 U. S. 592, 603; 17 L. Ed. 638, there was no agreed statement of facts presented to the trial court, but it was suggested in argument that plaintiff's attempted bill of exceptions which contained the evidence submitted by both parties, though not available as a bill of exceptions, might serve his purpose as an agreed statement of facts; but the Supreme Court held it not sufficient to constitute an agreed statement of fact saying that

> "Agreed statements rest upon the consent of the parties, and consequently, the action of the revising tribunal must be confined to the agreed facts and the facts cannot be said to be agreed while the parties are at issue as to the admissibility or competency of evidence".

There is nothing in this case prohibiting a court or a jury from drawing deductions or conclusions

from an agreed statement of probative or evidentiary facts.

The case of *The Clara,* 102 U. S. 200; 26 L. Ed. 145 is not one in which there was an agreed statement of facts, or a case stated. Findings of fact were made by the trial court, and on review the Supreme Court held that there being no finding that there was a failure on the part of the "Clara" to comply with certain requirements, that fact was presumed not to exist.

Old Colony Ry. Co. vs. *Wilder,* 137 Mass. 536, was technically a "case stated" in a civil action, and so are *Friedman* vs. *Jaffa,* 92 N. E. 704 (Mass.) and *Vera* vs. *Mercantile Co.,* 103 N. E. 292 (Mass.) in none of which was the court authorized to perform the duties of a jury as he was in the present case. In *Texas Mexican Ry. Co.* vs. *Scott,* 129 S. W. 1170 (Tex.) the case was submitted on an agreed statement of facts in accordance with statutory provisions under which the Court was not permitted to find facts different from those agreed upon. But the court said (p. 1178):

> "True, when the statement agreed upon embraces a written instrument, it is the duty of the court to construe the instrument, if it be open to construction."

And the case of *Crandall* vs. *Amador Co.,* 20 Cal. 72, was also a technical "case stated" under section 1138, Code of Civil Procedure of California.

The present case bears no analogy to these cases, for here the Court was not called upon to draw conclusions of law alone, but the evidence was submitted to him as well as to the jury and he was authorized by the parties to "instruct the verdict" (Tr. p. 99) and the jury was authorized to "follow the Court's intimation or opinion after a consideration of these stipulated facts." (Tr. p. 97)

No other meaning can be given the language of the United States Attorney (Tr. p. 97)

> "x x x in order that the matter may be properly and expeditiously tried and determined, that is, on the questions of law involved, counsel have stipulated as to what the facts are in this case, *with the further proviso that this court may pass upon the sufficiency of the facts, or the insufficiency thereof, and may either direct or intimate to the jury its opinion in the matter, the consent of the defendants being that the jury shall follow the Court's intimation or opinion* after a consideration of these stipulated facts. That procedure simply means, if carried out, that this jury is here by agreement *to follow the opinion of the Court* as to the sufficiency or insufficiency of the facts in the case."

And that the Court understood that he was requested not only to draw conclusions of law from the facts stated, but whatever conclusions of fact which the jury could draw, is apparent from his language (Tr. p. 98):

> "Perhaps that is no more than asking the Court to *pass on the sufficiency of the facts to warrant a conviction.*"

This is also presumable from the fact that the facts as well as the law were argued before him at great length, and particularly from the fact that he did assume the prerogatives of the jury and draw conclusions of fact from the evidence submitted.

POSITION OF GOVERNMENT ON REHEARING.

(1) The opinion reversing the judgment of the Court below rests upon two propositions:

First: That the constitutional right of a trial by jury has been abridged.

Second: That the agreed statement of facts has the attributes of a technical "agreed case" and permits of no decision except the question of law, and excludes the consideration of the facts as evidence from which logical and legitimate deductions and inferences might be drawn.

Neither proposition was urged in the court below, and the first proposition has not been urged in this court.

The second proposition we feel absolutely confident, was not only not in the mind of the plaintiffs in error until after they had submitted their cause and lost, but in point of fact from the showing herein can not be successfully urged from any standpoint.

The Government feels that in view in the fact that this is a test case (the Consul General of Great Brit-

ain being omitted from the indictment), and also that no imprisonment has been imposed on plaintiffs in error, and that the Government officials are in great need of the advice of the Court on this question in order to enable them to discern their duty more clearly, and also in order to protect our government from the charge of partiality in carrying out our neutral duties, that the Court should consider as waived the point of abridgment of trial by jury, inasmuch as it is not urged upon the Court, but expressly disclaimed. (Petition for Rehearing, p. 6).

We feel also that the second proposition is not well taken as a matter of law, and also that it is contrary to the letter, spirit and purpose of the stipulation. While the assignment of errors and exceptions are sufficient to raise the second point, the court's attention is invited to the so-called Statement of Grounds upon which exceptions are based (Tr. pp. 168 to 170) where no mention is made of the action of the court in treating the stipulation as evidence.

We therefore concur in the petition of plaintiffs in error, if the Court will consider the question intended to be submitted, to wit, "Would a jury be warranted in finding that section 10 was violated, if the evidence was that shown by the stipulation treated as evidence?"

If the Court feels that the record will not permit this, then of course the Government prefers to obtain a decision upon the issues of the indictment in a

manner that will not cause either of these questions to arise.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

ANNETTE ABBOTT ADAMS,
Assistant United States Attorney,

Attorneys for Defendant in Error.

United States of America,
Northern District of California,
City and County of San Francisco. } ss:

I, the undersigned, John W. Preston, United States Attorney for the Northern District of California, attorney for Defendant in Error and respondent, and on behalf of defendant in error and respondent herein, hereby certify that in my judgment the foregoing Reply to Petition of Plaintiffs in Error for a Rehearing of the judgment rendered in the above-entitled cause by the above-entitled court on the 19th day of February, 1917, is well founded, and I do certify that the same is not interposed for delay. Dated, San Francisco, Cal.

March 13th, 1917.

JOHN W. PRESTON.